IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS A. ROCHE,	:	NO. 06-cv-736
Petitioner	:	
	:	
VS.	:	
	:	
DAVID DIGUGLIELMO,	:	
AND	:	
THE DISTRICT ATTORNEY OF	:	
THE COUNTY OF MONTGOMERY,	:	
AND	:	
THE ATTORNEY GENERAL OF	:	
THE STATE OF PENNSYLVANIA,	:	
Respondents	:	

MEMORANDUM AND ORDER

CHARLES B. SMITH
CHIEF UNITED STATES MAGISTRATE JUDGE

Currently pending before the Court is a *pro se* petition for writ of habeas corpus filed, pursuant to 28 U.S.C. § 2254, by a prisoner incarcerated in the State Correctional Institution at Graterford, Pennsylvania. For the reasons which follow, the Court is ordering an evidentiary hearing.

I. PROCEDURAL HISTORY

After entering a plea of guilty to four counts of possession with intent to deliver on October 25, 2000, petitioner was sentenced to a term of seven to fourteen years imprisonment on February 13, 2001, by the Honorable Maurino J. Rossanese of the Montgomery County Court of Common

Pleas. Petitioner did not file a direct appeal, but on April 2, 2001, he filed a *pro se* motion to modify his sentence, which Judge Rossanese denied.

On February 26, 2002[1], petitioner filed a petition for relief, under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, et seq., in which he alleged claims of ineffective assistance of plea counsel. The Court appointed Jeanette Dickerson of the Public Defender's Office to represent petitioner on April 3, 2002. On August 1, 2003, appointed counsel filed a Motion for Time Credit, which Judge Rossanese granted on December 10, 2003, giving petitioner credit for the time served from April 25, 2000 to May 25, 2000. Petitioner then filed a *pro se* motion for replacement of his collateral counsel on February 11, 2005, which he asserts was after counsel told him she was closing his file without addressing his claims of ineffective assistance of counsel. In response to the motion, appointed counsel filed a memorandum indicating that she had assisted petitioner with the motion for time credit, which had been granted, and had informed petitioner that she could not assist him "in the matter of the mandatory sentence." (Respondent's Exhibit G). The motion was dismissed on February 11, 2005, by order attaching counsel's memorandum. On March 22, 2005, petitioner filed a Notice of Appeal to the Superior Court, which was presumably denied[2].

As petitioner asserts, the state court docket does not reflect that counsel ever filed a "no merit" letter or an amended PCRA petition and the Court never issued an order denying the *pro se* petition filed by petitioner. In an effort to pursue his claims, on February 15, 2005, petitioner filed a Petition for Writ of Mandamus with the Supreme Court of Pennsylvania requesting that it compel

[1]The PCRA petition is docketed as being filed on March 6. 2002. However, along with petitioner's reply to Respondent's Second Answer, petitioner has presented a copy of his PCRA petition, which is stamped February 26, 2002 by the Clerk of Courts Office, Montgomery County.

[2]An Order from the Superior Court is not included with the Exhibits presented in this case.

the trial court to rule on his PCRA petition, which had then been pending for over three years. The Pennsylvania Supreme Court denied the request on April 29, 2005.

The instant petition for writ of habeas corpus was filed on February 21, 2006. Petitioner raises three claims: (1) that plea counsel provided ineffective assistance, (2) that his conviction was in violation of the Fifth and Fourteenth Amendments, and (3) that his conviction was obtained and sentence imposed in violation of the Eighth Amendment.

The respondent argued that petitioner's claims are barred due to exhaustion and procedural default, since they have never been decided by the state court. By way of a Memorandum and Order, we rejected the respondent's exhaustion/procedural default arguments and ordered a more specific answer as to the merits of petitioner's claims of ineffective assistance of counsel, but agreed with the respondent that petitioner's two remaining claims are defaulted[3].

We therefore will proceed to address the merits of petitioner's claims of ineffective assistance of counsel.

II. STANDARD OF REVIEW

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),

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[3]Even in the Respondent's second Answer filed pursuant to the Court's Order, they claim that petitioner never filed a PCRA petition, but that the docket entry merely reflects a petition to proceed *in forma pauperis* for purposes of a PCRA petition. They assert that the motion to proceed *in forma pauperis* was incorrectly docketed as a PCRA petition, since this is the only document they have been able to produce. However, as reflected in our prior Memorandum & Order, the facts that (1) counsel was appointed after that filing, (2)that appointed counsel acknowledged that she filed a Motion, but could not help him on his sentencing issues, and (3) that petitioner made subsequent efforts to have his petition ruled upon, including filing of a writ of mandamus all supported the fact that he had filed a PCRA petition. Petitioner has now presented a copy of that petition which is stamped by the Clerk of the Montgomery County Court's office, clearly demonstrating that he filed the petition with the state court. Furthermore, this petition contains the same argument, which we are now addressing, i.e. ineffective assistance of counsel for failure to withdraw his plea given the defective colloquy and the fact that his sentence exceeded ten years.

> An application for a writ of habeas corpus on behalf of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless that adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The United States Supreme Court interpreted this statute and more clearly defined the two-part standard of review in Williams v. Taylor, 529 U.S. 362, 404-405, 120 S. Ct. 1495 (2000). Under the first prong of the review, a state court decision is "contrary to" the "clearly established federal law, determined by the Supreme Court of the United States," (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to that reached by [the Supreme Court]." Id. at 405. Pursuant to the second prong, a state court decision can involve an unreasonable application of Supreme Court precedent: (1) "if the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context should apply." Id. at 407-408.

III. DISCUSSION

Petitioner alleges ineffective assistance of counsel as a result of his counsel's failure to object

to his sentence based on the use of improper guidelines. He asserts that his attorney allowed him to be sentenced as a subsequent offender, resulting in a longer sentence thatexceeded the statutory maximum. He also alleges ineffective assistance of counsel as a result of his counsel's failure to advise him to withdraw his guilty plea when the sentencing judge refused to accept his plea agreement providing for a maximum sentence of ten years and presents a written colloquy form listing his maximum sentence as ten years.

These claims must be judged according to the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In Strickland, the Supreme Court set forth a two-prong test by which claims alleging counsel's ineffectiveness are reviewed. Id. at 687. First, the petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Id. at 688. It is well-established that counsel cannot be ineffective for failing to raise a meritless claim. Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000); Holland v. Horn, 150 F. Supp.2d 706, 731 (E.D. Pa. 2001). A federal habeas petitioner seeking to withdraw a guilty plea based on allegations of ineffective assistance of counsel must show that counsel's advice was not within the range of competence demanded by attorneys in criminal cases. Hollawell v. Stepanik, Civ. A. No. 92-3562, 1993 WL 62726, *2 (E.D. Pa. Pa. March 8, 1995) (citing Siers v. Ryan, 773 F.2d 37, 42 (3d Cir. 1985)).

Pursuant to the second prong, the defendant must prove that the deficient performance prejudiced the defense. Strickland 466 U.S. at 694. More specifically, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. In order to satisfy the prejudice requirement in the

context of a guilty plea, the petitioner needs to prove that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill, 474 U.S. at 59.

Counsel's failure to Object to Sentencing as a Subsequent Offender or to Sentence Exceeding Maximum:

Petitioner entered a guilty plea to four counts of possession with intent to deliver, all of which involved possession of greater than 100 grams of cocaine. On February 13, 2001, the Commonwealth filed a notice of Mandatory Sentence that indicated the Commonwealth's intention to seek the mandatory sentences pursuant to 18 Pa.C.S.A. § 7508. Pursuant to 18 Pa.C.S.A. § 7508, the mandatory minimum sentence for the first offense is four years and $25,000 and for each additional offense it is seven years and $50,000.[4] In accordance with this section, the Commonwealth's Notice indicated that they were seeking four years and $25,000 for one count and seven years and $50,000 for the other three. Petitioner has now alleged that since this was his first conviction, he was improperly sentenced to a minimum term of seven years as a subsequent offender and that counsel was ineffective for allowing this to happen.

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[4]The section provides as follows:

(3) A person who is convicted of violating section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance is coca leaves or is any salt, compound, derivative or preparation of coca leaves or is any salt, compound, derivative or preparation which is chemically equivalent or identical with any of these substances or is any mixture containing any of these substances except decocainized coca leaves or extracts of coca leaves which (extracts) do not contain cocaine or ecgonine shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:

(iii) when the aggregate weight of the compound or mixture of the substance involved is at least 100 grams; four years in prison and a fine of $25,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; however, if at the time of sentencing the defendant has been convicted of another drug trafficking offense: seven years in prison and $50,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity.

18 Pa.C.S.A. § 7508 (3)(iii).

However, pursuant to the statute, the fact that petitioner was being sentenced for multiple counts mandated that he be sentenced as a subsequent offender on all but one count. The statute provides as follows:

> **(a.1) Previous conviction.--**For purposes of this section, it shall be deemed that a defendant has been convicted of another drug trafficking offense when the defendant has been convicted of another offense under section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act, or of a similar offense under any statute of any state or the United States, whether or not judgment of sentence has been imposed concerning that offense.

18 Pa.C.S.A. § 7508(a.1). Counsel, therefore had no basis upon which to object to the mandatory minimum sentences as provided by the Commonwealth and as imposed by the judge, as they were in accordance with the relevant statute. Furthermore, the judge had no discretion in whether or not to impose the sentences. According to 18, Pa.C.S.A. § 7508 (c), "[t]here shall be no authority in any court to impose on an offender to which this section is applicable a lesser sentence than provided for herein or to place the offender on probation, parole, work release or prerelease or to suspend sentence..." 18 Pa.C.S.A. § 7508 (c). A review of the transcript from the sentencing hearing clearly reflects that petitioner's counsel knew and reported to the judge that these were petitioner's first convictions. Petitioner's counsel also requested that the sentences run concurrently, which request the judge granted.

With regard to petitioner's claim that his sentence exceeds the statutory maximum, this also is false. According to 35 P.S. § 780-113 (f), " Any person who violates clause (12), (14) or (30) of subsection (a) with respect to: (1) A controlled substance or counterfeit substance classified in Schedule I or II which is a narcotic drug, is guilty of a felony and upon conviction thereof shall be sentenced to imprisonment not exceeding fifteen years, or to pay a fine not exceeding two hundred

fifty thousand dollars ($250,000), or both or such larger amount as is sufficient to exhaust the assets utilized in and the profits obtained from the illegal activity." 35 P.S. § 780-113(f)(1). Petitioner was sentenced on one count to a term of seven to fourteen years, with the remainder of his sentences to run concurrently, which does not exceed the statutory maximum.

Accordingly, petitioner can not satisfy the first prong of Strickland, in that he cannot demonstrate that counsel's conduct fell below an objective standard of reasonableness. Petitioner's counsel cannot be ineffective for failing to raise a meritless challenge. Werts v. Vaughn, 228 F3d at 203.

Counsel's Failure to Advise Petitioner to Withdraw Plea After Sentencing Judge Refused to Accept Plea Agreement:

Plaintiff also alleges that his plea counsel was ineffective for failing to advise him to withdraw his plea after the sentencing judge refused to accept his plea agreement for a ten year maximum sentence. This claim, as it relates to an actual agreement with the Commonwealth, has no merit given the fact that petitioner entered an open plea. The record clearly indicates that there was no agreement and that petitioner acknowledged that he was entering an open plea. The Court addressed petitioner as follows:

> Q: (Judge Rossnese) You understand that this is an open plea, and that means that there are no deals between yourself and the Commonwealth, and that you are basically placing yourself on the mercy of the Court, do you understand that.
>
> A: (Petitioner) Yes, sir.

(Notes of Testimony, Guilty Plea, October 25, 2000, p. 5). Since petitioner clearly agreed on the record that there was no agreement with the Commonwealth, his counsel had no reason to advise him to withdraw the plea due to the Court's refusal to accept such an agreement. We must also reject this

claim as plaintiff has failed to satisfy either prong of the Strickland standard.

However, in support of his claim regarding an "agreement" to a maximum of ten years, petitioner has presented a written colloquy form which lists the maximum sentence as ten years with a maximum penalty of $100,000[5], for which Respondent has provided no explanation even in their second Answer filed pursuant to the Court's Order. Based upon the plea colloquy, it appears the petitioner was led to believe his maximum sentence was ten years, when in actuality the maximum for each of three of the four counts for which he entered a guilty plea was fifteen years, sentences which could have been imposed to run consecutively. While inartfully argued, petitioner now challenges the voluntariness of his plea, given the fact that he was advised that his maximum sentence was ten years. In fact, he clearly argues now, as he did in his PCRA petition, that counsel was ineffective for failing to withdraw his plea because his colloquy was defective and his plea was not knowingly or intelligently entered. Petitioner's arguments reflect his contention that he was not aware that his sentence could exceed ten years, that he would be sentenced on three of the four counts as a subsequent offender, or that his sentences could be consecutive resulting in a much

[5]It appears that rather than listing the maximum sentence for violation of 35 P.S. § 78–113(a)(30), with respect to § 780-113(f)(1), the colloquy form incorrectly lists the maximum sentence for violation of one count of §780-113(a)(30), pursuant to §780-113(f)(1.1), which pertains to violation of clause (30)(a) with respect to:

> (1.1) Phencyclidine; methamphetamine, including its salts, isomers and salts of isomers; coca leaves and any salt, compound, derivative or preparation of coca leaves; any salt, compound, derivative or preparation of the preceding which is chemically equivalent or identical with any of these substances, except decocanized coca leaves or extract of coca leaves, which extracts do not contain cocaine or ecgonine; and marihuana in a quantity in excess of one thousand (1,000) pounds, is guilty of a felony and upon conviction thereof shall be sentenced to imprisonment not exceeding ten years, or to pay a fine not exceeding one hundred thousand dollars ($100,000), or both, or such larger amount as is sufficient to exhaust the assets utilized in and the profits obtained from the illegal manufacture or distribution of these substances.
>
> 35 P.S. § 780-113(f)(1.1).

Furthermore, even if the colloquy form listed the 15 years and $250,000 as listed in §780-113(f)(1), this still would not have advised petitioner of his actual potential maximum sentence, given that he was entering a plea as to four separate counts.

higher maximum sentence.

To comport with the Fifth Amendment, a defendant's plea of guilty must be voluntary and intelligent. Boykin v. Alabama, 395 U.S. 238 (1969); see also Hill v. Lockhart, 474 U.S. 52, 56, (1985) ("[The] long standing test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'") (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). A guilty plea may be constitutionally infirm if a defendant failed to understand the constitutional rights he was waiving by pleading guilty or had an incomplete understanding of the charges lodged against him. Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976). The Court has held that at a minimum, a plea colloquy should establish that the defendant understood the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offense for which he is charged, and the permissible range of sentences. Boykin v. Alabama, 395 U.S. at 245 n. 7, 89 S.Ct. at 1713 n. 7. The burden is on the petitioner to establish that the plea was neither intelligent nor voluntary. United States v. Stewart, 977 F.2d 81, 84-85 (3d Cir. 1992).

Where it is determined that the guilty plea was intelligent and voluntary, habeas corpus review of claimed constitutional violations arising before the entry of the plea are generally not cognizable. Tollett v. Henderson, 411 U.S. 258, 266 (1973). A person who complains of antecedent constitutional violations is limited in a federal habeas corpus proceeding to attacks on the voluntary and intelligent nature of the guilty plea through proof that the advice received from counsel was not "within the range of competence demanded of attorneys in criminal cases." Blackledge v. Perry, 417 U.S. 21, 30 (1974) (quoting McMann v. Richardson, 397 U.S. 759, 771(1970));see also Hill, 474 U.S. at 58 (the two-prong test enunciated in Strickland applies equally to uninformed guilty pleas

that are alleged to be the result of ineffective counsel).

The determination of whether a guilty plea is "voluntary" is a question of federal law, but the determination of the historical facts surrounding the plea bargain is subject to the deferential "presumption of correctness." Marshall v. Lonberger, 459 U.S. 422, 431 (1983). Thus, a habeas petitioner challenging the voluntary nature of his plea faces the heavy burden of proof by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Zilich v. Reid, 36 F.3d 317, 320 (3d Cir. 1994). "The representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations made in open court carry a strong presumption of verity." Id. (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)).

Here, during the oral colloquy conducted on the record, Judge Rossanese referred to the written form, marked as D-1 consisting of 45 questions, which has been presented by petitioner. He asked petitioner whether his attorney had advised him of the maximum sentences to which petitioner responded that he had. (Notes of Testimony, Guilty Plea, October 25, 2000, pp. 4-5). However, a review of that form indicates that petitioner had been advised of the wrong maximum sentence, which mistake was not corrected during the oral colloquy. This form was signed by petitioner's plea counsel as well as petitioner.

We acknowledge that even if relief is granted to petitioner and he is able to withdraw his plea, he is subjecting himself to the possibility of a much longer aggregate sentence, given the fact that his current sentences are concurrent. Nonetheless, we are scheduling an evidentiary hearing to address the voluntariness of petitioner's plea, more specifically whether he was properly informed

regarding his possible maximum sentence and if not, whether he suffered prejudice sufficient to satisfy the second prong of the Strickland standard, as a result.

Accordingly, while we find no merit to plaintiff's allegations of ineffective assistance of counsel with regard to his claims that he was incorrectly sentenced or with regard to an actual agreement with the Commonwealth, we recognize a problem with the colloquy as to petitioner's possible maximum sentence, which presents a question regarding the voluntariness of his plea. The fact that petitioner presented this claim as ineffective assistance of counsel for failing to advise him of his right to withdraw his plea after the judge refused to accept the agreement for ten years or for allowing him to be sentenced beyond the maximum of ten years, is further evidence that he understood ten years to be the maximum sentence that could be imposed. Without some evidence that petitioner was informed of the actual potential maximum sentence, we are inclined to find that petitioner has satisfied the first prong of the Strickland standard, demonstrating that his counsel's conduct fell below an objective standard of reasonableness. We are scheduling an evidentiary hearing to examine this claim, which will allow the respondent to present the testimony of plaintiff's plea counsel and if necessary to determine if there was any prejudice, meaning whether this would have prevented petitioner from entering a plea. We recognize, however, that while petitioner could potentially be successful in proving his claim, it may not be in his best interest given that his potential sentence could be longer than the one he is currently serving.

An appropriate Order follows.

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VS.	:	
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DAVID DIGUGLIELMO,	:	
AND	:	
THE DISTRICT ATTORNEY OF	:	
THE COUNTY OF MONTGOMERY,	:	
AND	:	
THE ATTORNEY GENERAL OF	:	
THE STATE OF PENNSYLVANIA,	:	
Respondents	:	

ORDER

AND NOW, this 2nd day of June, 2006, it is hereby ORDERED that an Evidentiary Hearing in the above-captioned case is scheduled for Tuesday, August 1, 2006 at 10:00 am, in a courtroom to be assigned, to address the merits of petitioner's claim of ineffective assistance of counsel as it relates to his plea colloquy and his failure to be properly advised of his possible maximum sentence.

It is so ORDERED.

BY THE COURT:

/s/ Charles B. Smith
CHARLES B. SMITH
CHIEF UNITED STATES MAGISTRATE JUDGE